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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

NO. 85-1476

FRANK BLACKBURN, WARDEN
Louisiana State Penitentiary,

Petitioner,

v.

JAMES FLOWERS,

Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Michele Gaudin
614 Tchoupitoulas Street
New Orleans, La. 70130
(504) 524-7727

COUNSEL FOR JAMES FLOWERS

8 PP

REASON WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD NOT BE GRANTED

I.

THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT PROPERLY DETERMINED THAT THE JURY INSTRUCTIONS GIVEN BY THE TRIAL COURT AT THE GUILT/INNOCENCE PHASE OF REPONDENT'S TRIAL WERE UNCONSTITUTIONALLY BURDEN-SHIFTING AND THEREFORE A VIOLATION OF THIS COURT'S DECISION IN SANDSTROM VS. MONTANA, 442 US. 510, (1979)

TABLE OF CONTENTS

STATEMENT OF THE CASE .....

(i) Procedureal History .....
(ii)Statement of the Facts.....

REASON WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD NOT BE GRANTED .....

I.

THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT PROPERLY DETERMINED THAT THE JURY INSTRUCTIONS GIVEN BY THE TRIAL COURT AT THE GUILT/INNOCENCE PHASE OF RESPONDENT'S TRIAL WERE UNCONSTITUTIONALLY BURDEN-SHIFTING AND THEREFORE A VIOLATION OF THIS COURT'S DECISION IN SANDSTROM VS. MONTANA, 442 U.S. 510, (1979).....

CONCLUSION .....

TABLE OF AUTHORITIES

CASES	PAGES
Cabana v. Bullock, ____U.S.____(No. 84-1236 decided on January 22, 1986).	3
Enmund v. Florida, 458 U.S. 782, (1982)	3
Flowers v. Blackburn, 764 F.2d 276, (CA5, 1985) . . .	2
Sandstrom v. Montana, 442 U.S. 510, (1979).	4
State of Louisiana v. James Flowers, 441 So.2d 707, (La. 1983)	1
State ex rel Flowers v. Maggio, 466 So.2d 1293, (La. 1985)	2

STATUTORY AUTHORITY

LA. R.S. 14:24	3

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OF THE UNITED STATES

OCTOBER TERM, 1985

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATEMENT OF THE CASE[1]

(i) Procedural History

James Flowers was convicted by a jury of first degree murder and a sentence of death was recommended on February 5, 1982 in the 14th Judicial District Court in the Parish of Jefferson, State of Louisiana. The petitioner's conviction and sentence were affirmed on appeal, State v. Flowers, 441 So. 2d 707, La. 1983.

A petition for Post Conviction Relief, Writ of Habeas Corpus, Evidentiary Hearing, and Stay of Execution were filed on June 19, 1984. On June 21, 1984, the Stay Order was issued by the Honorable Lionel Collins, Division L, 24th Judicial District Court, ordering an evidentiary hearing limited to the issues of the constitutionality of the jury instructions and the effective assistance of counsel.

On November 5, 1984, Judge Collins issued a judgment denying the Writ of Habeas Corpus and setting aside the stay of execution stating that there was effective assistance of counsel. Relief was subsequently denied the respondent,

James Flowers, in the Louisiana Supreme Court. State ex rel Flowers vs. Maggio, 466 So. 2d 1293 (La. 1985).

Petitioner filed a Petition for Federal Habeas Corpus which was ultimately denied on May 1, 1985 by the United States District Court which had twice before denied relief but the case had been remanded by the Fifth Circuit for more complete review by the Federal Court.

The United States Court of Appeals granted petitioner's Certificate of Probable Cause on June 18, 1985. Flowers vs. Blackburn, 764 F.2d 276 (CA5, 1985).

On January 8, 1986, an opinion was rendered by a three Judge panel of the United States Court of Appeals for the Fifth Circuit reversing the denial of habeas relief by the United States District Court and ordering a new trial for James Flowers. Flowers vs. Blackburn, _____F.2d _____, (CA5, 1986). The decision was based on a finding by the Fifth Circuit that the jury instructions impermissibly relieved the State of their burden of proving that James Flowers had the intent to kill and amounted to unconstitutional burden-shifting.

(ii) Statement of Facts

James Flowers was arrested in October of 1981 and charged with first degree murder in Jefferson Parish, Louisiana. He was appointed counsel because of his indigency. In February of 1982, trial commenced. At the close of the trial and at the close of the sentencing hearing, the court instructed the jury that they could find Mr. Flowers guilty and further that they could sentence him to death even if he was only an aider and abettor to the crime. The instructions are clearly erroneous under Louisiana Law which specifically states that:

> "Not all principals are automatically guilty of the same grade of offense. One who aids and abets in the commission of a crime may be charged and convicted with a higher or lower degree of the crime depending upon the mental element proved at trial....Thus, an individual may only be convicted as a principal for those crimes for which he has the requisite mental state. In the case of a first degree murder conviction, the requisite mental state is that the defendant had the specific intent to kill. It is not enough to find merely that his co-conspirator or accomplice had the necessary mental state, since this intent cannot be inferred to the accused. It must also be shown that this accused had the specific intent to kill." LA. R.S. 14:24.

In the instant case,there was a co-defendant, one Olin Grant, who plead guilty to manslaughter and received a sentence of twenty-one years prior to this trial. The evidence presented implicated Mr. Grant to the same degree that it implicated Mr. Flowers. The case was wholly circumstantial and the effect of the Court's instruction was to allow the jury to find Mr. Flowers guilty and sentence him to death based upon their belief that either Mr. Flowers or Mr. Grant committed the crime.

REASON WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD NOT BE GRANTED

I.

> THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT PROPERLY DETERMINED THAT THE JURY INSTRUCTIONS GIVEN BY THE TRIAL COURT AT THE GUILT/INNOCENCE PHASE OF RESPONDENT'S TRIAL WERE UNCONSTITUTIONALLY BURDEN-SHIFTING AND THEREFORE A VIOLATION OF THIS COURT'S DECISION IN SANDSTROM VS. MONTANA, 442 U.S. 510, (1979).

The State presents two questions to this Court in its Petition for Writ of Certiorari. Both involve whether the death penalty could be invoked under Enmund vs. Florida, 458 U.S. 782 (1982) and Cabana vs. Bullock, _____U.S._____, (No. 84-1236 decided on January 22, 1986). The Fifth Circuit

decision had nothing to do with either of these cases and had nothing to do with the death penalty being imposed in this particular case. The Fifth Circuit in its decision in this case, held that the jury instructions given by the trial court at the guilt/innocence phase of respondent's trial were unconstitutionally burden-shifting and therefore in violation of this Court's decision in Sandstrom vs. Montana, 442 U.S. 510, (1979). That is the only issue addressed by the Fifth Circuit in this case. The State continues to misunderstand the issue in this case, that James Flowers could have been convicted as an aider and abettor even though he did not kill or intend to kill under the erroneous instructions given by the Court.

CONCLUSION

Respondent, James Flowers, for the reason stated above prays that the Warden's Petition for Writ of Certiorari be denied.

Respectfully submitted,

MICHELE GAUDIN
614 Tchoupitoulas Street
New Orleans, La. 70130
(504) 524-7727

COUNSEL FOR JAMES FLOWERS

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon the attorneys of record of all parties to the above cause by enclosing the same in an envelope addressed to such attorneys at their business address as disclosed by the pleadings of record herein, with postage fully prepaid and by depositing said envelope in a U. S. Post Office mail box,
on the 27 day of August 1986.